

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

RAYS PLUMBING & HEATING	:	
SERVICE, INC., a Delaware corp.,	:	C.A. No. K10C-02-022 WLW
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
STOVER HOMES, L.L.C., a	:	
Delaware limited liability company	:	
and GARY L. STOVER, JR.,	:	
individually,	:	
	:	
Defendants.	:	

Submitted: April 18 2011

Decided: July 26, 2011

ORDER

Upon Defendant Gary L. Stover, Jr.'s
Motion to Dismiss.
Granted.

Scott E. Chambers, Esquire of Schmittinger & Rodriguez, Dover, Delaware; attorneys for the Plaintiff.

Stephen W. Spence, Esquire of Phillips, Goldman & Spence, P.A., Wilmington, Delaware; attorneys for Defendant Gary L. Stover, Jr.

WITHAM, R.J.

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The issue before the Court is whether there is an implied private right of action for subcontractors against “agents of contractors” under Title 6, Chapter 35 of the Delaware Code.

FACTS

Stover Homes, L.L.C. (“Stover Homes”) is a general contractor in Kent County. Stover Homes hired Ray’s Plumbing & Heating (“Plaintiff”) (as a subcontractor) to install plumbing and heating in newly constructed homes. Plaintiff performed work from March of 2007 to March of 2008.

According to the complaint, Stover Homes received payments for the construction projects that Plaintiff worked on, but failed to pay Plaintiff. Under 6 *Del. C.* §3502, a general contractor holds payments covering subcontracting work as a trustee. The general contractor is prohibited from using the funds for its own purposes until it has paid all outstanding amounts due to subcontractors.¹ Plaintiff alleges that Stover Homes misappropriated \$68,863.73 from a building trust fund account.

Gary Stover (“Defendant”) was a managing member of Stover Homes. Plaintiff alleges that Defendant personally directed the wrongful appropriation and facilitated it by fraudulently assuring homeowners that subcontractors had already been paid.

Plaintiff is seeking to hold Defendant personally liable for fraud and for a violation of Title 6, Chapter 35 (“chapter 35”). Defendant filed a motion to dismiss, arguing that the fraud claim was not stated with sufficient particularity and that the

¹ 6 *Del. C.* §3503.

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statutory claim is impermissible because there is no basis for a private right of action.

The Court issued an order on December 15, 2010, declining to dismiss the fraud claim and reserving judgment as to whether to dismiss the chapter 35 claim. The Court found that Defendant was not a contractor under Chapter 35. The parties were directed to brief the issue of whether chapter 35 provides an implied private right of action for subcontractors against agents of contractors. Briefing was completed on April 11, 2011.

Standard of Review

When deciding a motion to dismiss under Superior Court Civil Rule 12(b)(6), all factual allegations in the complaint are accepted as true.² If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.³ That is, a motion to dismiss is decided on “whether a plaintiff may recover under any conceivable set of circumstances susceptible to proof under the complaint.”⁴ Consequently, dismissal will only be warranted when “under no reasonable interpretation of the facts could the complaint state a claim for which relief might be granted.”⁵

² *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

³ *Id.*

⁴ *Id.*

⁵ *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super.).

DISCUSSION

The parties do not dispute that Stover Homes may be liable under chapter 35 if it misappropriated assets from a building trust fund. The question presented is whether chapter 35 provides a private right of action for subcontractors against an individual agent of a contractor, such as Defendant. Unfortunately, Plaintiff has not specified which section of Chapter 35 gives rise to the asserted implied private right of action. This order will briefly review the text and history of laws codified in Chapter 35, and then conduct an implied private right of action analysis.

Chapter 35 is made up of two separate acts—enacted 60 years apart—governing the relationship between contractors, subcontractors, and owners. Sections 3502-3505 were originally enacted in 1933 under the grandiloquent title:

An Act Prohibiting Architects, Engineers, Contractors, Subcontractors and their Agents from paying out, using or appropriating moneys and funds and received for the erection, construction, alteration, completion and repair of buildings and for additions thereto before first paying in full or pro rata all claims due to Surveyors, Engineers and Persons Furnishing Labor and Material.⁶

Courts have generally referred to the act by the more manageable title of the Contractor Trust Fund act (“CTF”). Section 3502 provides that all monies received by a contractor on a building contract are held in trust. Section 3503 prohibits a contractor from using money from a building trust fund until it has paid subcontractors in full for their work on the project. Section 3504 provides that failure

⁶ 38 Del. Laws, c. 169.

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to pay subcontractors within 30 days of receiving building trust fund money is prima facie evidence that a contractor has misappropriated money in contravention of section 3503. Finally, section 3505 provides criminal penalties for contractors and “agents of contractors” who misappropriate money from a building trust fund.

The second half of chapter 35, sections 3506-3509 (referred to as the Prompt Payment Act or “PPA”) was enacted during the 1990s.⁷ It provides mandatory terms and default rules for construction contracts, and it provides a procedure for dispute resolution between contracting parties. It does not address the breach of trust situation contemplated by the CTF. It therefore cannot provide a basis for Plaintiff’s asserted private right of action.

After reviewing the various provisions of chapter 35, it appears that section 3505 is the only section providing a penalty for agents of contractors who wrongfully take assets from a building trust fund. Therefore, as a preliminary matter, it appears that it provides the only possible basis for the asserted implied private right of action. This presents a question for statutory interpretation.

Delaware Courts traditionally apply the three-factor implied private right of action analysis first articulated by the Supreme Court of the United States in *Cort v. Ash*.⁸

(1) whether the plaintiff is a member of a class for whose especial benefit

⁷ 6 Del. C. §§ 3506-3509; 70 Del. Laws, c. 420.

⁸ *Cort v. Ash*, 422 U.S. 66, 78 (1975). The Supreme Court also considered a fourth factor (concerning the propriety of federal jurisdiction) that is inapplicable to actions in state courts. *Id.*

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the statute was enacted; (2) whether there is any indication of legislative intent to grant or deny a private right of action; and (3) whether recognition of an implied private right of action would advance the statute's purpose.⁹

Subsequent Supreme Court decisions have adopted a stricter analysis focused entirely on legislative intent.¹⁰ Delaware has not adopted the new standard yet; however, a Delaware Court of Chancery decision found that the Delaware Supreme Court will likely embrace the newer federal standard at the first opportunity because State law in this area has traditionally tracked Federal law.¹¹ This Court is persuaded by the Chancellor's reasoning, and finds that statutory intent is determinative in a private right of action analysis. However, it appears that both forms of analysis lead to the same conclusion in this case. Therefore, the Court will use the familiar *Cort* factors to provide a structure for the analysis and as a means for ascertaining statutory intent.

(1) Membership in a class for whose benefit the statute was enacted

_____Subcontractors are a class of beneficiaries under CTF.¹² Section 3503 prohibits contractors from appropriating assets from a building trust fund until subcontractors have been paid, and section 3505 provides criminal penalties for contractors and

⁹ *O'Neill v. Middletown*, 2006 WL 205071, at *16 (Del. Ch. Jan. 2006) (providing a helpful analysis of a complex doctrine).

¹⁰ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹¹ *O'Neill v. Town of Middletown*, 2006 WL 205071, at *19 (Jan. 18, 2006).

¹² 6 Del. C. §3502. *See Moran v. Crowe*, 413 B.R. 168 (2009) (finding that sections 3504 and 3505 give rise to a fiduciary relationship in which subcontractors and material men are the beneficiaries).

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agents of contractors who ignore the prohibition. Clearly, subcontractors are a class of persons for whose especial benefit the statute was enacted. Thus, the first *Cort* factor suggests that it would not be inconsistent with statutory intent to find an implied private right of action for subcontractors.

(2) Indication of legislative intent

The second factor of the *Cort* test, which is determinative under the newer *Sandoval* analysis, is more difficult.¹³ Sometimes a statute will provide a policy statement and then direct the courts to apply liberal construction in order to facilitate its purpose.¹⁴ The analysis is more complicated here because there is no clear statutory directive. The Court will look to precedent cases for guidance.

In *Heller v. Dover Warehouse Market, Inc.*, the court considered whether an implied private right of action exists under a Delaware law prohibiting employers from forcing employees to submit to polygraph tests.¹⁵ The law provides that such use of polygraph tests is illegal, and it sets a criminal penalty for violations.¹⁶ Thus, a literal analysis would suggest that it is a purely criminal law. The court acknowledged that the law was penal in nature, but it found that the statute also had

¹³ *O'Neill v. Town of Middletown*, 2006 WL 205071, at *19 (Jan. 18, 2006) (explaining that courts have focused on the second factor of the *Cort* test after the decision in *Alexander*).

¹⁴ *See Young v. Joyce*, 351 A.2d 857 (Del. 1975) (involving a consumer fraud statute that specifically called for liberal construction in order to prevent consumer fraud).

¹⁵ *Heller v. Dover Warehouse Market, Inc.*, 515 A.2d 178 (Del. Super. 1986).

¹⁶ 19 Del. C. § 704.

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a remedial purpose of protecting employees from being subjected to unlawful polygraph examinations.¹⁷ The court held that “redress for damages is not assured unless a private cause of action is implied under the statute.” Therefore, it found that the legislature must have intended to create a private right of action in order to effectuate the statute.¹⁸

The *Heller* decision relied upon the reasoning of *Callaway v. N.B. Downing Co.*¹⁹ In *Callaway*, the question presented was whether the state’s minimum wage law provides an implied private right of action for employees against employers who paid them less than the minimum wage. As with the polygraph statute, the minimum wage law did not expressly address civil actions. It simply made it illegal to pay less than the minimum wage and set criminal penalties for violations.²⁰

Yet, the court was persuaded by the reasoning of sister-state high courts that had decided that similar minimum wage statutes had a dual purpose of punishing offenders and assuring employees of a minimum wage.²¹ It further determined that the statute’s remedial purpose creates what is effectively a right to a minimum wage. After finding that a criminal sanction would be insufficient to secure that right, the

¹⁷ *Heller*, 515 A.2d at 180-181.

¹⁸ *Id.* at 181.

¹⁹ *Callaway v. N.B. Downing Co.*, 172 A.2d 260 (Del. Super. 1961).

²⁰ 29 Del. C. 6913 (1953).

²¹ *Callaway*, 172 A.2d at 262-263.

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court held that the statute contained an implied private right of action for employees against employers who have paid them less than the minimum wage.²² The court reasoned that the legislature must have intended to create a private right of action because it would not create a right without a corresponding remedy.²³

In this case, as in *Heller* and *Callaway*, the statute prohibits certain conduct and establishes a criminal penalty for violations.²⁴ It does not mention civil actions. Thus, a textual analysis suggests that the statute is punitive—and therefore generally would not give rise to an implied private right of action. The critical question is whether the statute has a dual remedial purpose that would call for the implication of a private right of action as in the precedent cases. Defendant argues that decisions such as *Heller* and *Callaway* can be distinguished because they involved statutes protecting particularly vulnerable plaintiffs who would not have any other legal recourse in the absence of an implied private right of action.

Courts are hesitant to find an implied private right of action unless there is strong evidence that the legislature intended to create it.²⁵ To do otherwise is to risk

²² *Id.* at 263.

²³ *Id.*

²⁴ The PPA sections of Chapter 35 would be relevant in a civil action for breach of contract. However, those sections are not implicated in this case because Gary Stover, as the Court determined in its December order, is not a contractor.

²⁵ *Alexander*, 532 U.S. at 286-287.

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going beyond the judicial task of interpreting the law.²⁶ Therefore, it is important to determine why both the *Heller* and *Callaway* courts found an implied private right of action under statutes that did not mention civil actions.

In *Callaway*, the relevant statute concerned a class of employees paid less than the minimum wage. Individuals who are willing to work for less than minimum wage are obviously particularly vulnerable to exploitation. That observation underlined the court's determination that the legislature enacted the minimum wage law to protect such individuals—rather than merely to penalize employers.²⁷ Once the Court decided that the statute had a remedial purpose, it naturally concluded that the express criminal penalty, alone, would be insufficient to effectuate the statute's purpose. Although a criminal sanction against the employer may deter future violations of the minimum wage statute, it would provide little solace to exploited employees. In fact, without an implied private right of action, the employees would have no other recourse. An employer who contracted for less than the minimum wage would not have committed fraud or breach of contract. Thus, an implied private right of action provided the only possible means for effectuating the statute's remedial purpose.

Similarly, the *Heller* court found that the polygraph statute was designed to protect employees from being coerced into taking polygraph examinations. As in *Callaway*, there were no existing civil actions available to employees who were

²⁶ *Id.* at 286.

²⁷ *Callaway*, 172 A.2d at 263.

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subjected to the proscribed conduct despite the statute. Therefore, the Court determined that the legislature must have meant to provide a private right of action in order to effectuate the statute.

This case is distinguishable from *Callaway* and *Heller* because the class of individuals protected by the building trust fund law has access to alternative civil remedies. A subcontractor may seek an equitable remedy for breach of trust,²⁸ or breach of contract.²⁹ Alternatively, a subcontractor may bring an action for fraud against a contractor's agent--as Plaintiff has done in this case. The existence of these civil remedies undermines the suggestion the statute contains a remedial goal that could only be accomplished by an implied private right of action. Therefore, the Court is disinclined to recognize, for the first time, the existence of an implied private right of action under section 3505.

(3) Whether a private right of action is consistent with the statute's purpose

A private right of action would not be inconsistent with the statute's apparent purpose of deterring breach of trust by owners and contractors. However, there is no indication that the legislature intended to create a private right of action against "agents of contractors." The criminal portions of the act--the only sections addressing breach of trust--have not been substantially amended over the approximately 80 years

²⁸ See *Maull v. Stokes*, 68 A.2d 200 (Del. Ch. 1949) (finding that a subcontractor may bring an action in equity for breach of trust).

²⁹ 6 Del. C. 3506 (providing a mandatory prompt payment provision for construction contracts).

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since they were enacted. That fact suggests that the omission of a private right of action was not an oversight.

CONCLUSION

Under the circumstances of this case, this Court is unwilling to make the jump to the future supported by the Plaintiff. For the foregoing reasons, Defendant's motion to dismiss the chapter 35 claim is granted.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Counsel